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DEFENDANT'S (CORRECTED) MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

Preliminary Statement

In this lawsuit, plaintiff the Associated Press ("AP") sought access pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552 et seq., to documents concerning, among other things, the Administrative Review Boards ("ARBs") conducted by defendant the United States Department of Defense ("DOD") at the United States Naval Base, Guantanamo Bay, Cuba ("Guantanamo"), since December 2004. AP also sought production of documents concerning allegations of abuse of detainees at Guantanamo by U.S. military personnel as well as documents concerning detainee-against-detainee abuse. As demonstrated below, DOD performed comprehensive searches for documents responsive to AP's requests, and produced more than 1400 pages of documents. DOD redacted from these voluminous materials the names and other identifying information of U.S. military personnel, the detainees, and third parties mentioned in the documents.

AP does not contest the withholding of identifying information of U.S. military personnel from any of the documents at issue. Moreover, the Solicitor General has determined not to authorize an appeal of this Court's rulings in the related FOIA action, AP v. DOD, 05 Civ. 3941 (JSR), and accordingly DOD intends to produce to AP both the Combatant Status Review Tribunal ("CSRT") documents at issue in the related case and (with two exceptions) the ARB documents at issue in this case, with only the identities of DOD personnel redacted. DOD's remaining withholdings in this case, however, present issues distinct from the related case, are not governed by the Court's earlier rulings, and should be upheld by this Court.

First, DOD has properly withheld under Exemptions 6 and 7(C) identifying information of detainees contained in documents concerning alleged abuse of detainees at Guantanamo. Disclosure of the detainees' identifying information in this context "would constitute a clearly unwarranted invasion of [the detainees'] personal privacy," 5 U.S.C. § 552(b)(6), or, at a minimum, "could reasonably be expected to constitute an unwarranted invasion of personal privacy," 5 U.S.C. § 552(b)(7)(C). As alleged victims of abuse, the detainees mentioned in the documents have cognizable privacy interests in avoiding being exposed to public scrutiny. Balanced against this privacy interest is the minimal public interest in learning the identities of the alleged victims of abuse, given the significant volume of material already produced by DOD concerning the allegations of abuse, including detailed information on the nature of the allegations, DOD's investigations thereof, and the disciplinary actions taken by DOD in response. Disclosure of the detainees' names and other identifying information would not shed any light on how DOD conducts its detention operations or investigates alleged abuse, and the detainees' privacy interests thus substantially outweigh any public interest in disclosure.

DOD has also correctly withheld under Exemption 6 the names and addresses of family members identified in correspondence provided to the ARBs by two detainees. This information is protected from disclosure under Exemption 6 because its disclosure could place the family members at serious risk of harm, given those detainees' unfavorable testimony about the Taliban, which continues to be engaged in active hostilities in Afghanistan. Disclosure of this information therefore would constitute a clearly unwarranted invasion of the family members' personal privacy.

Finally, DOD has properly withheld, pursuant to FOIA Exemption 5, 5 U.S.C.

§ 552(b)(5), as well as Exemption 6, the identifying information of detainees who DOD determined, as a result of the ARB process, should be transferred out of Guantanamo to the custody of their home countries. This information is exempt from disclosure for two reasons. First, DOD's initial determination to transfer a detainee from Guantanamo is predecisional because it does not become final until DOD and the Department of State have obtained the requisite diplomatic assurances from the country to which the detainee is being transferred, and a final determination is made. Accordingly, as to detainees for whom diplomatic assurances have not been procured, this information is protected from disclosure by the deliberative process privilege, which is incorporated into FOIA Exemption 5. Furthermore, disclosure of the identities of detainees who are in the process of being transferred, or have already been transferred, exacerbates the potential harm to the detainees and their family members from those who may be displeased by the detainees' testimony before the CSRTs or ARBs. This subset of information within the ARB documents thus warrants protection under Exemption 6 as well.

STATEMENT OF FACTS[1]

A. AP's FOIA Requests and the Instant Lawsuit

On November 16, 2004, AP submitted to DOD a request under FOIA seeking, among other things, copies of documents relating to disciplinary actions initiated since January 2002 as a result of allegations of mistreatment at Guantanamo, and copies of documents identifying allegations of detainee-against-detainee abuse at Guantanamo. Normand Decl., Exh. A at Exh. A.

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[1] DOD is not submitting a Statement pursuant to Local Civil Rule 56.1, in accordance with the general practice in this Circuit. See Ferguson v. FBI, No. 89 Civ. 5071, 1995 WL 329307, at *2 (S.D.N.Y. June 1, 1995) (rejecting plaintiff's argument that agency's summary judgment motion should be denied for failure to submit a statement pursuant to former Local Rule 3(g), and noting that "in FOIA actions, such a requirement would be meaningless. As a result, the general rule in this Circuit is that in FOIA actions, agency affidavits alone will support a grant of summary judgment." (citing Carney v. Dep't of Justice, 19 F.3d 807, 812 (2d Cir.), cert. denied, 513 U.S. 823 (1994))), aff'd, 83 F.3d 41 (2d Cir. 1996). If the Court wishes DOD to submit such a Statement, we will do so promptly.

AP submitted a further FOIA request on January 18, 2005, seeking production of documents relating to the ARBs conducted at Guantanamo since December 2004.[2] Normand Decl., Exh. A at Exh. B. AP's FOIA request relating to the ARBs sought, among other things, transcripts of the ARB proceedings, written statements and other documents provided by detainees, witness affidavits, allegations against the detainees, and details and explanations of the decisions to release or transfer detainees. Normand Decl., Exh. A at Exh. B.

AP filed this action on June 9, 2005, seeking to compel DOD to produce the documents requested in its November 16, 2004 and January 18, 2005 FOIA requests. Normand Decl., Exh. A. On July 1, 2005, this Court entered a Stipulation by the parties, which limited or clarified certain of AP's requests, and provided that DOD would respond to such requests, as modified by the Stipulation and Order, within certain prescribed deadlines. Normand Decl., Exh. B.

B. DOD's Search for and Production of Responsive Documents

In response to AP's FOIA requests, DOD conducted comprehensive searches and produced more than 1400 pages of responsive documents. Hecker Decl. ¶¶ 5, 8-10. No documents were withheld from production in their entirety based on any FOIA exemption. See id. ¶¶ 15-19. However, selected identifying information was redacted from the documents that were produced, as described further in Point C, infra.

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[2] The purpose of the ARB process is to assess annually whether each detainee who had previously been determined by a CSRT to be an enemy combatant, continues to pose a threat to the United States or its allies, or whether there are other factors bearing on the need for continued detention. Declaration of Karen L. Hecker dated February 22, 2006 ("Hecker Decl.") ¶ 3a. The first round of ARBs began in December 2004 and was completed in January 2006. Id. ¶ 4a. In total, 464 ARBs were held during that time frame. Id.

1. ARB Documents

ARBs for detainees held by DOD at Guantanamo are conducted by DOD's Office for the Administrative Review of the Detention of Enemy Combatants ("OARDEC").[1] Hecker Decl. ¶ 3a. The recommendation by the ARB as to whether a particular enemy combatant should be transferred, released, or continue to be detained is memorialized in a document entitled "Record of Proceedings and Basis for ARB Decision." Id. ¶ 3g. This document contains both classified and unclassified material. Id.

The ARB's recommendation is forwarded to the Designated Civilian Official ("DCO"), who makes a preliminary decision (and ultimately the final determination) whether to release, transfer, or continue to detain the individual. Id. ¶ 3h.[2] The DCO's preliminary determination is reflected in an action memorandum that contains both classified and unclassified information. Id. If the DCO determines that continued detention is warranted, the enemy combatant will remain in DOD custody, and a new review date will be scheduled to ensure an annual review of the enemy combatant's detention status. Id. ¶ 3i. If the DCO determines that a detainee should be transferred from Guantanamo, that initial determination triggers a sensitive diplomatic process, which is necessary to effectuate the transfer. Id. ¶¶ 3j-n. The transfer determination does not become final until this diplomatic process is concluded and a final decision as to transfer is made. Id.

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[1] OARDEC also handles the CSRTs conducted for each detainee held by DOD at Guantanamo. Hecker Decl. ¶ 3a n.1.

[2] The current Deputy Secretary of Defense, Gordon England, is the DCO for the ARB process. Hecker Decl. ¶ 3b. He also served as the DCO in his prior position as the Secretary of the Navy. Id.

Prior to each detainee's ARB, OARDEC prepares an unclassified written summary that contains the primary factors favoring his continued detention and the primary factors favoring his release or transfer. Id. ¶ 3d. This document is provided to the enemy combatant in his native language and in English before the ARB. Id. An Assisting Military Officer ("AMO"), with the assistance of a translator if needed, is appointed to assist the enemy combatant in reviewing this document and in preparing for and presenting information to the ARB. Id. The enemy combatant may elect to appear in person before the ARB, which is composed of three military officers. Id. ¶ 3c, e. He may also provide a written statement or other documents to the ARB by providing this information to his AMO or directly to the ARB during the proceeding. Id. ¶ 3e. If an enemy combatant elects not to attend his ARB, the ARB will proceed in his absence. Id.

OARDEC maintains a separate file for each ARB in its headquarters in Arlington, Virginia. Id. ¶ 4b. All of the documents requested in AP's FOIA request for ARB information are contained in the ARB files in OARDEC's Virginia office. Id. To search for documents responsive to this part of the FOIA request, members of OARDEC's legal staff reviewed OARDEC's ARB files. Id. ¶ 4c. The search date was June 6, 2005, and the ARB files that were in OARDEC's Virginia office as of that date were searched. Id. When staff members found responsive documents, those documents were pulled from the file, copied, and set aside for further review to determine whether any portions of them were subject to any FOIA exemption. Id. This search and review process took several weeks. Id.

As a result of its search, OARDEC ultimately located responsive documents in five of the six categories requested by AP. Id. ¶ 5.

a. Transcripts of Testimony Given at ARB Proceedings

If a detainee participated in his ARB, DOD prepared a summarized transcript of that portion of the proceeding, entitled "Summarized Administrative Review Board Detainee Statement." Id. ¶ 3f. For a short period at the beginning of the ARB process, a transcript was also prepared even when the enemy combatant did not attend his ARB. Id. The transcript in such a case simply reflects the absence of the detainee and then the closing of the unclassified session. Id. Shortly after beginning the ARB process, OARDEC stopped creating transcripts when the detainee was absent. Id. Other than as described above, no other transcripts of testimony before the ARBs have been generated by DOD. Id.

As of the search date, the transcripts of eighty-five ARBs had been finalized and forwarded from Guantanamo to OARDEC headquarters in Virginia, including transcripts where the detainee did not attend the ARB session. Id. ¶ 5a. These documents were produced to AP with the withholdings described infra. Id.

b. Written Statements Provided by Detainees to the ARBs

As of the search date, twelve detainees had provided written statements for use at an ARB proceeding. Id. ¶ 5b. These documents were produced to AP with the withholdings described infra. Id.

c. Documents Provided by Detainees to Assisting Military Officers

As of the search date, two detainees had provided documents to an AMO[3] for use at an ARB proceeding. Id. ¶ 5c. These documents were produced to AP with the withholdings

[3] AP's FOIA request sought documents provided to detainees' "personal representatives." Normand Decl., Exh. A at Exh. B. Personal Representatives assist detainees at CSRTs. Hecker Decl. ¶ 5c. The AMO serves a comparable role at the ARB, and thus AP's request was construed as asking for documents provided by detainees to their AMOs. Id.; Normand Decl., Exh. B ¶ 2i.

described infra. The documents consist of letters sent to the detainees at Guantanamo by their family members and include those individuals' names and addresses. Id.

d. Affidavits Submitted by Witnesses to the ARBs

There are no witnesses at ARBs. Id. ¶ 5d. Accordingly, DOD located no documents responsive to this request. Id.

e. Allegations Against the Detainees

This request was construed as asking for the unclassified written summary that contains the primary factors favoring the detainee's continued detention and the primary factors favoring his release or transfer. Id. ¶ 5e. The parties agreed that DOD would produce the summaries that were provided to each detainee who had been the subject of an ARB as of the date of the search. Id.; Normand Decl., Exh. B ¶ 2k. The written summaries for 125 detainees were produced to AP with the withholdings described infra. Hecker Decl. ¶ 5e.

f. Details and Explanations of Decisions to Release or Transfer Detainees

The "decision to release or transfer" a detainee, Normand Decl., Exh. A at Exh. B, is made by the DCO following his review of the recommendation of the ARB, entitled "Record of Proceedings and Basis for ARB Decision," and following the accomplishment of the diplomatic process. Hecker Decl. ¶ 5f. The DCO's action is documented in a memorandum. Id. As of June 6, 2005, the DCO had elected to commence the transfer process with respect to twenty-three detainees. Id. The Records of Proceedings and DCO action memoranda were produced to AP with the withholdings described infra. Id.

2. Disciplinary Records Related to Allegations of Mistreatment at Guantanamo

When DOD receives FOIA requests for documents regarding its detainee operations at Guantanamo, they are forwarded to the United States Southern Command ("USSOUTHCOM"), which then forwards the requests to Joint Task Force-Guantanamo ("JTF-Guantanamo"). Hecker Decl. ¶ 6.[4] When responsive documents are found by JTF-Guantanamo, they are forwarded to USSOUTHCOM for review, and are then forwarded to the Pentagon for final processing. Id. USSOUTHCOM also conducts a search for responsive documents in its files and forwards responsive documents to the Pentagon. Id. The legal offices of each organization were involved in processing the FOIA requests made by AP in this case. Id.

a. Individual Disciplinary or Investigatory Files

To search for documents responsive to AP's request for "copies of documents sufficient to identify each disciplinary action initiated since January 2002 as the result of an allegation of mistreatment at Guantanamo," Normand Decl., Exh. A at Exh. A, members of the JTF-Guantanamo legal staff searched and reviewed JTF-Guantanamo's files for responsive documents regarding disciplinary actions. Hecker Decl. ¶ 7. Among other duties, this office is responsible for advising the commander of JTF-Guantanamo regarding investigations and potential disciplinary actions to be taken against individuals who engage in misconduct at Guantanamo. Id. This office also consulted and coordinated with individuals at the legal office at USSOUTHCOM. Id. These searches and consultations occurred in June 2005. Id.

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[4] JTF-Guantanamo consists of several thousand U.S. service members and civilians representing the Army, Navy, Air Force, Marine Corps and Coast Guard. Hecker Decl. ¶ 6. The mission of JTF-Guantanamo is to conduct detention and intelligence-gathering operations in support of the Global War on Terrorism, to coordinate and implement detainee-screening operations, and to support law enforcement and war crime investigations. Id. USSOUTHCOM is JTF-Guantanamo's parent command. Id.

The disciplinary files maintained at Guantanamo typically contain a record of the disciplinary action and a report of the investigation conducted with regard to the alleged misconduct. Id. ¶ 8. When the staff members found responsive documents, those documents were pulled from the file, copied, and set aside for further review to determine whether any portions of them were subject to any FOIA exemption. Id. As a result of that search, various documents were produced to AP with the withholdings described infra. Specifically, DOD's search located eight individual disciplinary or investigatory files. Id. ¶ 8a-h.

The first file concerned alleged misconduct in May 2002 involving several interactions between an agitated detainee and a guard at the detention hospital. Id. ¶ 8a. The file contained a letter reprimanding the commander of the military police battalion for failing to establish a positive leadership climate, and the investigative inquiry into the allegations that led to the discipline. Id. The inquiry documents included statements by the subject of the investigation and military witnesses. Id.

The second file concerned an investigation into alleged misconduct in September 2002. Id. ¶ 8b. The file contained a form reflecting the nonjudicial punishment imposed on a soldier for assault based on his attempt to spray a disruptive detainee with a water hose, and the soldier's statement concerning the incident. Id.

The third file concerned an investigation into alleged misconduct in October 2004. Id. ¶ 8c. The file contained the nonjudicial punishment imposed on a soldier for assault after he struck a detainee on the mouth with his fist as he tried to subdue the detainee, and the investigative inquiry into the allegations that led to the discipline. Id. The inquiry documents included statements by the subject of the investigation and military witnesses. Id.

The fourth file concerned an investigation into alleged misconduct in March 2003, in which a guard was alleged to have inappropriately used pepper spray on a detainee. Id. ¶ 8d. The file contained a draft court-martial charge sheet for an assault charge, a nonjudicial punishment form for the same allegation, the commander's recommendation regarding discipline, and the investigatory inquiry into the allegations that led to the discipline. Id. The inquiry documents included statements by the subject of the investigation and military witnesses, as well as the standard operating procedures for pepper spray. Id.

The fifth file concerned an investigation into alleged misconduct in April 2003, in which a guard was alleged to have struck a detainee, failed to properly secure a detainee's cell, and been disrespectful to his superior officer. Id. ¶ 8e. The file contained the nonjudicial punishment imposed on the guard for assault, dereliction of duty and disrespect toward a commissioned officer, and the investigatory inquiry into the allegations that led to the discipline. Id. The inquiry documents included the findings and recommendations of the investigating officer, statements by the guard and other military witnesses, the legal advice provided to the commander regarding the investigation, and the recommendations of various commanders regarding the discipline that should be imposed. Id.

The sixth file concerned an investigation into alleged misconduct in January 2004, in which a guard was alleged to have verbally harassed a detainee and splashed a cleaning product in his face. Id. ¶ 8f. The file contained the nonjudicial punishment imposed on the guard for assault and violation of a military regulation, and the investigatory inquiry into the allegations that led to this discipline. Id. The inquiry documents included the findings and recommendations of the investigating officer, statements by the guard and other military witnesses, the legal advice provided to the commander regarding the investigation, and the recommendations of various commanders regarding the discipline that should be imposed. Id.

The seventh file concerned an investigation into alleged misconduct in March 2004, in which guards were alleged to have mistreated a detainee by not taking him to a restroom promptly enough. Id. ¶ 8g. These allegations were not substantiated. Id. The file contained the findings and recommendations of the investigating officer, statements by the guard and other military witnesses, the legal advice provided to the commander regarding the investigation, and the recommendations of various commanders regarding the investigation. Id.

The eighth file concerned an investigation into alleged mistreatment in April 2003, in which interrogators were alleged to have mistreated a detainee during an interrogation. Id. ¶ 8h. The file contained a letter reprimanding the Director of the Joint Intelligence Group, the findings and recommendations of the investigating officer, statements by the interrogators and other military witnesses, medical records of the detainee, the legal advice provided to the commander regarding the investigation, and the recommendations of various commanders regarding the discipline that should be imposed. Id.

b. Summary Documents

DOD's Office of Public Affairs was also asked to search for documents responsive to AP's request for documents concerning alleged abuse of detainees. Hecker Decl. ¶ 9. That search yielded two documents consisting of summaries of substantiated abuse allegations and were produced to AP without redactions. Id. A similar summary document was found during the search of JTF-Guantanamo's files and was also produced without redaction. Id.

3. Documents Regarding Detainee-Against-Detainee Abuse

AP initially requested "copies of documents sufficient to identify each allegation of detainee-against-detainee abuse at Guantanamo Bay, Cuba, since January 2002, including a description of the alleged abuse and any action(s) in response." Normand Decl., Exh. A at Exh.

A. AP later agreed to limit this request to allegations reported by military personnel to their superiors or to other components of DOD. Id. at Exh. B ¶ 2b; Hecker Decl. ¶ 10. The request was forwarded to JTF-Guantanamo and USSOUTHCOM, through the process described supra. Hecker Decl. ¶ 10. As a result of the search conducted in June 2005, documents were produced to AP with the withholdings described infra. Id. These documents constitute the reporting of detainee-against-detainee abuse allegations that were recorded by military personnel in the course of their official duties. Id.

4. Number of Allegations of Abuse at Guantanamo That Have Been Reported Through the CSRTs

AP's request for "documents sufficient to identify the number of allegations of abuse at Guantanamo Bay, Cuba, since January 2002 that have been reported through the Combatant Status Review Tribunals," Normand Decl., Exh. A at Exh. A, was forwarded to OARDEC. Hecker Decl. ¶ 11. OARDEC maintained this statistic in its normal course of business, and it was provided to AP. Id.

5. Number of Allegations of Mistreatment Committed by Translators

AP initially requested "copies of documents sufficient to identify the number of allegations of mistreatment committed by translators at Guantanamo Bay, Cuba, since January 2002, including a description of the alleged mistreatment and any action(s) in response." Normand Decl., Exh. A at Exh. A. AP later agreed to limit this request to allegations reported by military personnel to their superiors or to other components of DOD. Id. at Exh. B ¶ 2d; Hecker Decl. ¶ 12. This request was forwarded to JTF-Guantanamo and USSOUTHCOM through the process described supra. Hecker Decl. ¶ 12. No responsive documents were found in either organization. Id.

6. Number of Detainees Transferred or Released from Guantanamo Who Had Been Treated for Medical Problems During Their Detention

AP initially requested "copies of documents sufficient to identify the number of detainees transferred or released from Guantanamo who had been treated for medical problems during their detention." Normand Decl., Exh. A at Exh. A. AP later agreed to exclude from this request routine physical examinations undergone by detainees. Id. at Exh. B ¶ 2e; Hecker Decl. ¶ 13. This request was forwarded to JTF-Guantanamo and USSOUTHCOM through the process described supra. Hecker Decl. ¶ 13. The Joint Medical Group-Guantanamo ("JMG-Guantanamo") is responsible for providing medical care to detainees at Guantanamo and for maintaining the medical records that document that care. Id. These records are often extremely voluminous. Id. JMG-Guantanamo personnel inspected the medical files of the 234 detainees who had left Guantanamo as of the search date of June 1, 2005. Id. JMG-Guantanamo was unable to locate the medical files of three of these detainees. Id. Each of the 231 files that JMG-Guantanamo inspected contained documents demonstrating that the detainee had received medical care beyond routine physical examinations. Id. AP accordingly was advised that the number of detainees who had been transferred or released from Guantanamo after being treated for medical problems during their detention was "at least 231" of the 234 detainees who had left Guantanamo. Id.

7. Construction Contracts Relating to Work Performed at Guantanamo

AP initially requested "copies of documents sufficient to identify each construction contract relating to work performed at Guantanamo Bay, Cuba, since January 2002, including the name of the contractor, the contract amount, and a description of the services to be provided." Normand Decl., Exh. A at Exh. A. AP later agreed that DOD could comply with this request by sending a summary document listing the name of the contractor, the contract amount and a brief description of the services provided. Id. at Exh. B ¶ 2f; Hecker Decl. ¶ 14. This request was forwarded to Naval Facilities Engineering Command, Atlantic, which is responsible for maintaining contracting information for construction at JTF-Guantanamo. Hecker Decl. ¶ 14. That organization conducted a computer search for the requested information on June 18, 2005. Id. The requested information was subsequently provided to AP without redaction. Id.

C. The Information Withheld

The vast majority of the information requested by AP has been produced. DOD has withheld from the documents identifying information of U.S. military personnel, detainees, and third parties mentioned in the documents, pursuant to Exemptions 5, 6 and 7(C), as set forth below.[5]

1. Information Withheld from the ARB Documents

DOD has withheld from the ARB transcripts and related documents the names of U.S. military personnel who participated in the ARBs. Hecker Decl. ¶ 15 n.8. AP does not challenge the withholding of identifying information of DOD personnel. Normand Decl. ¶ 5.

DOD has also redacted from the ARB documents the names and other identifying information of detainees and third parties mentioned in the documents. See Hecker Decl. ¶¶ 15-16. Because the Solicitor General has determined not to authorize an appeal of the Court's Orders dated January 4 and January 23, 2006 ("January 4 Order" and "January 23 Order," respectively), DOD intends to release the ARB documents to AP, except as noted below, with only the names of U.S. military personnel redacted.[6]

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[5] Although DOD did not previously invoke Exemptions 5 or 7(C) during the administrative process as to the information presently at issue, it is well settled that an agency may invoke an exemption for the first time in district court. See, e.g., Young v. CIA, 972 F.2d 536, 538-39 (4th Cir. 1992) ("an agency does not waive FOIA exemptions by not raising them during the administrative process"). Other information was previously withheld pursuant to Exemptions 1, 5, and 7, but AP has advised the Government that it is not contesting those withholdings. Normand Decl. ¶ 5.

DOD continues to withhold two categories of ARB documents. First, DOD is withholding, pursuant to Exemptions 5 and 6, the identifying information of detainees contained in transfer documents. Hecker Decl. ¶ 16. Second, DOD is withholding, pursuant to Exemption 6, the identity of the family members of two detainees who testified before and submitted personal correspondence to the ARBs. Hecker Decl. ¶¶ 15b-d, & Exhs. 6-7.

2. Information Withheld from Documents Concerning Allegations of Abuse of Detainees by DOD Personnel

DOD has withheld from the documents concerning allegations of abuse of detainees by U.S. military personnel the identifying information of DOD personnel. Hecker Decl. ¶ 17 n.11. DOD withheld this information for personnel who were witnesses to alleged misconduct, investigating officers and legal advisors, and subjects of investigation. Id. ¶ 18a-c. AP does not challenge these withholdings. Normand Decl. ¶ 5. DOD has also withheld from these documents, pursuant to Exemptions 6 and 7(C), the names and internee serial numbers ("ISNs") of the detainees who allegedly were the subjects of abuse by U.S. military personnel. Id. ¶ 17.

3. Information Redacted from Documents Concerning Detainee-Against-Detainee Abuse

DOD has withheld from the documents concerning detainee-against-detainee abuse the identifying information of U.S. military personnel who were witnesses to the alleged incidents between detainees. Hecker Decl. ¶ 19 n.12. AP does not challenge these withholdings.

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[6] Although the Court's January 23 Order directs DOD "to provide [AP] with unredacted copies of the applicable [CSRT] transcripts and documents," January 23 Order at 14, AP never contested DOD's withholding of the names of tribunal presidents, and AP has since confirmed that it does not seek disclosure of the names of DOD personnel in either the CSRT or the ARB documents. Normand Decl. ¶ 5.

Normand Decl. ¶ 5. DOD has also withheld from these documents the names and ISNs of the detainees who were involved in the alleged incidents. Hecker Decl. ¶ 19. DOD has withheld this information pursuant to FOIA Exemptions 6 and 7(C). Id.

ARGUMENT

BECAUSE DOD HAS DEMONSTRATED THAT ITS SEARCH WAS REASONABLE AND THAT THE INFORMATION IT HAS WITHHELD IS EXEMPT FROM DISCLOSURE, THE COURT SHOULD GRANT DOD'S MOTION FOR SUMMARY JUDGMENT

A. Standard of Review

FOIA was enacted to "ensure an informed citizenry, . . . needed to check against corruption and hold the governors accountable to the governed." NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 242 (1978). The statute requires each federal agency to make available to the public an array of information, and sets forth procedures by which requesters may obtain such information. See 5 U.S.C. § 552(a). At the same time, FOIA exempts nine categories of information from disclosure, while providing that "[a]ny reasonably segregable portion of a record shall be provided . . . after deletion of the portions which are exempt under this subsection." 5 U.S.C. § 552(b). "FOIA represents a balance struck by Congress between the public's right to know and the government's legitimate interest in keeping certain information confidential." Center for Nat'l Sec. Studies v. Dep't of Justice, 331 F.3d 918, 925 (D.C. Cir. 2003), cert. denied, 540 U.S. 1104 (2004).

Summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure is the procedural vehicle by which most FOIA actions are resolved. See, e.g., Miscavige v. IRS, 2 F.3d 366, 369 (11th Cir. 1993) ("Generally, FOIA cases should be handled on motions for summary judgment, once the documents in issue are properly identified."). "In order to prevail on a motion for summary judgment in a FOIA case, the defendant agency has the burden of showing that its search was adequate and that any withheld documents fall within an exemption to FOIA." Carney v. Dep't of Justice, 19 F.3d 807, 812 (2d Cir.), cert. denied, 513 U.S. 823 (1994). "Affidavits or declarations supplying facts indicating that the agency has conducted a thorough search and giving reasonably detailed explanations why any withheld documents fall within an exemption are sufficient to sustain the agency's burden." Id. (footnote omitted); see also Halpern v. FBI, 181 F.3d 279, 291 (2d Cir. 1999) (same). Although this Court reviews de novo the agency's determination that requested information falls within a FOIA exemption, see 5 U.S.C. § 552(a)(4)(B); Halpern, 181 F.3d at 287, the declarations submitted by the agency in support of its determination are "accorded a presumption of good faith," Carney, 19 F.3d at 812 (citation and internal quotation marks omitted).

B. DOD Conducted a Reasonable Search for Responsive Documents

An agency discharges its search obligations under FOIA by "demonstrat[ing] that it has conducted a search reasonably calculated to uncover all relevant documents." Weisberg v. U.S. Dep't of Justice, 745 F.2d 1476, 1485 (D.C. Cir. 1984); Oglesby v. U.S. Dep't of the Army, 920 F.2d 57, 68 (D.C. Cir. 1990) ("In order to obtain summary judgment the agency must show that it made a good faith effort to conduct a search for the requested records, using methods which can be reasonably expected to produce the information requested."). The agency is not required to search every record system, but need only search those systems in which it believes responsive records are likely to be located. Oglesby, 920 F.2d at 68; see also Grand Central Partnership, Inc. v. Cuomo, 166 F.3d 473, 488 (2d Cir. 1999) (agency's search need not be perfect, only reasonable).

In this case, DOD conducted searches reasonably designed to uncover documents responsive to AP's FOIA requests. Each of AP's requests was forwarded to the appropriate component of DOD, which conducted a search of relevant records. See Hecker Decl. ¶¶ 4-5 (OARDEC's search for ARB documents); id. ¶¶ 6-10 (JTF-Guantanamo's, USSOUTHCOM's, and DOD's Office of Public Affairs' search for documents concerning alleged detainee abuse); id. ¶ 11 (OARDEC's search for documents sufficient to identify the number of allegations of abuse reported through the CSRTs); id. ¶ 12 (JTF-Guantanamo's and USSOUTHCOM's search for documents sufficient to identify the number of allegations of abuse committed by translators); id. ¶ 13 (JMG-Guantanamo's search for documents sufficient to identify the number of transferred or released detainees who had received non-routine medical treatment at Guantanamo); id. ¶ 14 (Naval Facilities Engineering Command's search for construction contract information). DOD's declaration is "reasonably detailed and reveal[s] that each of the [DOD] subdivisions undertook a diligent search for documents responsive to [AP's] requests." Carney, 19 F.3d at 813. Accordingly, DOD has discharged its search obligations.

C. DOD Properly Withheld Detainees' Identifying Information Pursuant to FOIA Exemptions 6 and 7(C)

1. FOIA Exemptions 6 and 7(C)

Two FOIA exemptions are specifically aimed at protecting the privacy of personal information in government records. Exemption 7(C) protects records "compiled for law enforcement purposes" where disclosure "could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(7)(C). Exemption 6, which is not limited to law enforcement records, protects information contained in "personnel and medical files and similar files" where disclosure "would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6). Exemption 7(C) "is more protective than Exemption 6" because the former "applies to any disclosure that 'could reasonably be expected to constitute' and invasion of privacy that is 'unwarranted,'" while the latter exemption bars only disclosures "that 'would constitute' an invasion of privacy that is 'clearly unwarranted.'" Dep't of Defense v. FLRA, 510 U.S. 487, 496-97 n.6 (1994).

Both exemptions require the Court to balance the privacy interests at stake against the public's interest in disclosure. U.S. Dep't of Justice v. Reporters Comm. for Freedom of Press, 489 U.S. 749, 776 (1989); Dep't of the Air Force v. Rose, 425 U.S. 352, 372 (1976). Establishing that disclosure of personal information would serve a public interest cognizable under FOIA is the plaintiff's burden. See National Archives & Records Admin. v. Favish, 541 U.S. 157, 172 (2004); Carter v. U.S. Dep't of Commerce, 830 F.2d 388, 391 n.13 (D.C. Cir. 1987). The "only relevant public interest to be weighed in this balance is the extent to which disclosure would serve the core purpose of FOIA, which is contribut[ing] significantly to public understanding of the operations or activities of the government." FLRA, 510 U.S. at 495 (internal citation and quotation marks omitted) (emphasis added). Thus, the statutory purpose of FOIA is not "fostered by disclosure of information about private citizens that is accumulated in various government files but reveals little or nothing about an agency's own conduct." Reporters Comm., 489 U.S. at 773.

2. The Identifying Information of Detainees Who Allegedly Were Abused or Involved in Abuse Is Protected from Disclosure Under Exemptions 6 and 7(C)

a. The Withheld Information Constitutes Medical or Similar Files

The purpose of Exemption 6 is to "protect individuals from the injury and embarrassment that can result from the unnecessary disclosure of personal information." United States Dep't of State v. Washington Post Co., 456 U.S. 595, 599 (1982). The Supreme Court has interpreted

Exemption 6 broadly, making clear that the statutory language files "similar" to personnel or medical files encompasses any "information which applies to a particular individual." Id. at 602; see also New York Times Co. v. NASA, 920 F.2d 1002, 1005, 1009-10 (D.C. Cir. 1990) (finding voice tapes from the shuttle Challenger to be "similar files" because they identified crew members by the sound and inflection of their voices). Because the information withheld "can be identified as applying to" the detainees involved in the alleged abuse, Washington Post, 456 U.S. at 602; Hecker Decl. ¶¶ 17, 19, the information plainly satisfies the "similar files" requirement of Exemption 6.

Although this Court in its earlier rulings did not reach the issue of whether the detainees' and third parties' identifying information contained in the CSRT documents constituted "similar" files, see January 4 Opinion at 6 n.4; January 23 Opinion at 10, the Court stated that "[n]otwithstanding the broad language of Washington Post, this Court might hesitate to adopt a view of the first requirement of Exemption 6 that in effect renders that requirement a nullity," January 23 Opinion at 9-10. DOD respectfully submits that the Supreme Court's broad definition of "similar files" as including any information that "applies to a particular individual," Washington Post, 456 U.S. at 602, is well established. In fact, in Wood v. FBI, 432 F.3d 78 (2d Cir. 2005), the Second Circuit specifically noted the Supreme Court's statement in Washington Post that "Exemption 6 covers 'information which applies to a particular individual,'" and concluded that "any personal information contained in files similar to medical and personnel files, including the type of highly detailed records found in investigative files, is subject to the balancing analysis under Exemption 6." Id. at 87 n.6 (citation omitted). See also Perlman v. U.S. Dep't of Justice, 312 F.3d 100, 106 (2d Cir. 2002) ("The statute . . . describes 'similar files' broadly, and the term includes any 'detailed government records on an individual which can be identified as applying to that individual." (quoting Washington Post, 456 U.S. at 602)), vacated and remanded, 541 U.S. 970 (2004), and aff'd, 380 F.3d 110 (2d Cir. 2004) (per curiam).

In this case, moreover, some of the detainee identifying information withheld by DOD was contained in the medical files of particular detainees, Hecker Decl. ¶¶ 8h, 17c, which are clearly covered by Exemption 6, see 5 U.S.C. § 552(b)(6) (referring to "personnel and medical files and similar files").

b. The Documents Concerning Alleged Detainee Abuse Constitute Law Enforcement Files

The documents concerning alleged abuse of detainees also constitute "records or information compiled for law enforcement purposes" under Exemption 7. 5 U.S.C. § 552(b)(7). With respect to the documents relating to alleged abuse of detainees by U.S. military personnel, those records and the information contained therein were compiled for purposes of enforcing the Uniform Code of Military Justice ("UCMJ"), 10 U.S.C. § 801 et seq. Hecker Decl. ¶ 17(a). Specifically, the documents were created in the course of investigations pursuant to the UCMJ to determine whether military personnel had engaged in any criminal misconduct and, if so, how those personnel should be disciplined for such conduct. Id.

With respect to identifying information contained in the documents concerning alleged detainee-against detainee abuse, which is maintained in the Detainee Information Management System, this information, too, is compiled for law enforcement purposes because it assists the Joint Detention Group in enforcing policies and rules governing the detention of enemy combatants. Id. ¶ 19a. Violation of such policies or rules is punished by various disciplinary methods, which constitute a law enforcement mechanism. See id. Maintaining order and discipline among the detainee population, and punishing misconduct, is a critical law enforcement function of DOD personnel at Guantanamo. Id. The identifying information contained in the records of alleged detainee abuse was therefore compiled for law enforcement purposes. See Center for Nat'l Sec. Studies, 331 F.3d at 918.

c. The Detainees Have Cognizable Privacy Interests in Their Identifying Information

Once it has been established that the information at issue constitutes a medical or "similar file[]," 5 U.S.C. § 552(b)(6), or was "compiled for law enforcement purposes, 5 U.S.C. § 552(b)(7), the Court must balance the public's interest in disclosure against the privacy interest that would be furthered by non-disclosure. See FLRA, 510 U.S. at 495; Reporters Comm., 489 U.S. at 776; Rose, 425 U.S. at 372. The detainees at Guantanamo have protectible privacy interests in avoiding disclosure of their identities in connection with allegations of abuse by U.S. military personnel or other detainees. Hecker Decl. ¶¶ 17b-c, 19b-c. Release of this information would subject the detainees to public scrutiny as victims of alleged abuse by members of the United States Government. This interest is even stronger in the context of law enforcement records. Id. ¶¶ 17b, 19b. Further, some of the documents disclosed to AP were medical records of particular detainees, in which the detainees have a particularly acute privacy interest. Id. ¶ 17c. Such privacy interests in avoiding disclosure of personal information, particularly in the context of disciplinary or investigatory files, is cognizable under FOIA Exemptions 6 and 7(C). See, e.g., United States Dep't of State v. Ray, 502 U.S. 164, 175-76 (1991); Rose, 425 U.S. at 380; Carter v. Dep't of Commerce, 830 F.2d at 390; Ligorner v. Reno, 2 F. Supp. 2d 400, 405 (S.D.N.Y. 1998). The fact that AP apparently intends to publish the detainees' identifying information exacerbates the potential harm from disclosure of the detainees' personal information. See Ray, 502 U.S. at 549.

This Court previously held in the related FOIA litigation that the detainees had no cognizable privacy interest because they had no reasonable expectation that the information they provided to the CSRTs would remain private. See January 23 Order at 2; January 4 Order at 4-5. DOD respectfully submits that the existence of a privacy interest protected by Exemptions 6 and 7(C) (unlike in the Fourth Amendment context) does not turn on whether an individual has a reasonable expectation of privacy. See Reporters Comm., 489 U.S. at 763 n.13 ("The question of the statutory meaning of privacy under the FOIA is, of course, not the same as the question whether a tort action might lie for invasion of privacy or the question whether an individual's interest in privacy is protected by the Constitution."), cited in Favish, 541 U.S. at 170 ("We have observed that the statutory privacy right protected by Exemption 7(C) goes beyond the common law and the Constitution."); Rose, 425 U.S. at 380-81 (summaries of disciplinary proceedings properly withheld under FOIA even though they were at one time distributed within the Air Force Academy and thus the subjects could not have had a reasonable expectation that the documents would remain private).

In any event, the Court's reasoning that the detainees had no expectation of privacy in documents related to the CSRTs, which the Court considered to be "quasi-judicial proceedings," January 23 Order at 10-11, is inapplicable to the documents at issue here. None of the factors that the Court deemed relevant to that determination -- the presence at the CSRTs of "the equivalent of a court reporter" and members of the press, the appointment of a personal representative to advise the detainee, or the tribunal president's explanation of the CSRT process to the detainee, see id. -- is present in the context of the documents concerning alleged abuse of detainees. Nor is there any reason to believe that the detainees named in those documents had any expectation that their identities would be made public, through FOIA or otherwise, in connection with allegations of abuse. Indeed, there is no reason to believe that the detainees are even aware of the existence of these documents. Hecker Decl. ¶¶ 17d, 19d.

Moreover, Congress and the courts have recognized that victims of crime have a privacy interest even in records of public court proceedings. For instance, the Crime Victims' Rights Act, 18 U.S.C. § 3771(a)(8), requires courts to conduct proceedings "with respect for the victim's dignity and privacy." Consistent with this principle, courts have recognized that public access to judicial records may be denied where necessary to protect "the privacy and reputation of victims of crime." United States v. Amodeo, 44 F.3d 141, 147 (2d Cir. 1995) (quoting In re Nat'l Broadcasting Co., 663 F.2d 609, 613 (D.C. Cir. 1980)) (internal quotation marks omitted). For this additional reason, therefore, the Court's earlier reasoning that detainees do not have a reasonable expectation of privacy in documents related to "quasi-judicial proceedings" should not be extended to the documents relating to alleged abuse of detainees.

d. The Detainees' Privacy Interests Outweigh the Minimal Public Interest in Disclosure of Their Identifying Information

In light of the voluminous information already produced by DOD concerning allegations of detainee abuse at Guantanamo, the privacy interests of the detainees mentioned in the abuse documents substantially outweigh any public interest in learning their identities. DOD has produced a tremendous amount of information concerning allegations of abuse of detainees at Guantanamo, including the contents of eight disciplinary or investigatory files, with only the names and other identifying information of U.S. military personnel and detainees redacted, as well as three unredacted summary documents. Hecker Decl. ¶¶ 8-9. DOD also produced numerous documents relating to reported detainee-against-detainee abuse. Id. ¶ 10. Altogether, DOD has provided AP with more than 450 pages of documents -- with only minimal redactions

-- which detail the nature of the allegations of detainee abuse, DOD's investigations regarding such allegations, and the results of those investigations, including the discipline imposed. See id. ¶¶ 8-10. DOD has also released significant information concerning alleged detainee abuse outside the FOIA context. Id. ¶ 18. DOD has thus already provided substantial material that "sheds light on [DOD's] performance of its statutory duties." Reporters Comm., 489 U.S. at 773. In sharp contrast, the identifying information withheld from the documents "reveals little or nothing about [DOD's] own conduct." Id. Release of the identifying information would not provide any appreciable information about DOD's detention operations at Guantanamo, the nature of the allegations of detainee abuse, the extent of DOD's investigation of those allegations, or any discipline imposed.

As the Supreme Court has instructed, where government misconduct is asserted as a basis for a public interest under Exemption 6, the requester must establish both that the public interest is "significant," and that the information sought is "likely" to advance that interest. Favish, 541 U.S. at 172-73. Given the large body of information available concerning allegations of detainee abuse at Guantanamo, AP cannot establish any significant public interest in learning the names of the detainees who allegedly were abused, much less that release of the identifying information is likely to advance the public's interest in confirming or refuting the allegations of government misconduct, or determining the adequacy of DOD's investigation thereof. See Davis v. Dep't of Justice, 968 F.2d 1276, 1282 (D.C. Cir. 1992) (inquiring whether information sought would confirm or refute alleged government misconduct).

Because the withheld information would not "contribute significantly to public understanding of the operations or activities of the government," Reporters Committee, 489 U.S. at 775, there is little, if any, public interest in its release. See Ray, 502 U.S. at 178 (reasoning that the "public interest has been adequately served by disclosure of redacted interview summaries," and the "addition of the redacted identifying information [of Haitian returnees] would not shed any additional light on the Government's conduct"); Wood, 432 F.3d at 89 ("Given that the FBI has already revealed the substance of the investigation and subsequent adjudication, knowledge of the names of the investigators would add little, if anything, to the public's analysis of whether the FBI dealt with the accused agents in an appropriate manner."); Miller v. Bell, 661 F.2d 623, 630-31 (7th Cir. 1981) (finding minimal public interest where the documents produced "reveal the entire course of the investigation and the facts it uncovered").

For all of these reasons, the detainees' privacy interests substantially outweigh any public interest in the identifying information withheld, see Wood, 432 F.3d at 89 ("Because we find the public interest to be negligible, the investigators' interests in preventing public disclosure of their identities substantially outweighs it."), and DOD's withholdings accordingly should be withheld under Exemptions 6 and 7(C) of FOIA.

3. The Identifying Information of the Family Members of Two Detainees Who Provided Testimony and Personal Correspondence to the ARB Is Protected from Disclosure Under Exemption 6

In its earlier rulings, this Court left open the possibility that "in the particular circumstances of a particular detainee, [DOD] could meet [its] burden [under Exemption 6] with respect to some particular items of the redacted information." January 4 Opinion at 6 n.3. Although the Government does not believe that under Exemptions 6 and 7(C) such a particularized showing is required, with respect to the names and addresses of family members contained in correspondence provided by two detainees to the ARBs, DOD is making a particularized showing. In light of those detainees' testimony before the ARBs concerning the Taliban, and the resultant risk of harm to the identified family members, disclosure of their names and addresses would constitute a clearly unwarranted invasion of their personal privacy.

With respect to the first detainee, in his testimony before the ARB, the detainee admitted that he had been a driver for a Taliban leader. Hecker Decl. ¶ 15b(1) & Exh. 6. He claimed, however, that he only worked for the Taliban because he needed money for medical treatment. Id. The transcript thus suggests that the detainee cooperated with the ARB and, in doing so, disclaimed any loyalty to the Taliban. Id. The detainee also proffered to the ARB four pieces of personal correspondence, which contained the names and addresses of the detainee's family members. Id. Although a member of the press was present at this detainee's ARB, that individual was not provided with copies of the letters submitted to the ARB, nor were the letters read aloud or their contents discussed in detail. Id. ¶ 15b(1).

The second detainee also provided testimony to the ARB about the Taliban, which continues to be engaged in active hostilities in Afghanistan. Hecker Decl. ¶ 15b(2) & Exh. 7. He stated, "These are the people who have destroyed Afghanistan, so I despise[] these people." Id. The detainee was reluctant to provide the ARB with correspondence from his wife, noting, "It is a big shame in our culture to read my wife's letter for you, but now I am in a very tough situation with the letter from my wife. Do you want it as evidence?" Id. The detainee ultimately provided the letter, and correspondence from other family members, to the ARB. Id. No members of the press were present at this detainee's ARB proceeding. Hecker Decl. ¶ 15b(2).

DOD has serious concerns that disclosure of the names and addresses of these detainees' family members would place them at substantial risk of harm, and thus would constitute a clearly unwarranted invasion of their personal privacy. Id. ¶ 15c. In addition to the reasons set forth in DOD's briefs and declarations filed in the related litigation, which are incorporated herein by reference, DOD believes that the particular testimony of these detainees is likely to be perceived by members of the Taliban (including the former associates of one detainee) as hostile and even traitorous. Id. In that event, such persons may well attempt to retaliate against the detainees' family members, whose names and addresses are contained within the documents. Id.

Although, as noted above, DOD does not believe that the applicability of Exemption 6 turns on a reasonable expectation of privacy, the record in this case suggests that the family members would have had no expectation that their identities would have been made public through the ARB process. Id. ¶ 15d. While the detainees themselves may have been aware that the proceedings were being recorded, see January 23 Order at 10, the detainees had no reason to expect that the transcript of the proceeding (if they were even aware that a transcript was being created) would be disclosed outside of DOD, or even Guantanamo. Id. The detainees' family members would have had even less reason to expect that their names and addresses would be released to the general public through the ARBs, much less publicly linked with their family members' unfavorable testimony about the Taliban. Id. Indeed, the testimony of the second detainee (at whose ARB proceeding no press was present) that it would be a "big shame in our culture" to disclose his wife's letter to the ARB, belies any such expectation. Id. & Exh. 7. For all of these reasons, DOD properly withheld the family members' identifying information pursuant to Exemption 6.

D. The Identifying Information of Detainees Who the DCO Has Determined Should Be Transferred from Guantanamo Is Protected Under FOIA Exemptions 5 and 6

Finally, DOD has properly withheld, pursuant to Exemption 5, the identifying information of detainees who the DCO initially determined as a result of the ARB process should be transferred from Guantanamo.

1. The Process of Transferring Detainees from Guantanamo

The transfer process is described in detail in the Declaration of Karen L. Hecker, filed herewith, and the annexed declarations of former Deputy Assistant Secretary of Defense for Detainee Affairs Matthew Waxman, and former Ambassador-at-Large Pierre-Richard Prosper. Hecker Decl. ¶¶ 3g-n, 16 & Exhs. 4-5. The DCO makes the initial determination that a detainee should be transferred from Guantanamo. Id. ¶ 3h. If the DCO believes that the enemy combatant can be transferred to another country, that proposal is forwarded to interested United States Government agencies. Id. ¶ 3j. DOD then undertakes a process, typically involving the United States Department of State, in which appropriate assurances regarding the detainee's treatment are sought from the country to which the transfer of the detainee is proposed. Id. The purpose of those transfer discussions is to determine what measures the receiving government is likely to take to ensure that the detainee will not pose a continuing threat to the United States or its allies, and to obtain appropriate transfer assurances that the detainee will be treated humanely and in accordance with the international obligations of the country accepting transfer. Id. ¶ 3k.

If the appropriate assurances are not obtained, the transfer will not occur, and the initial transfer determination of the DCO will not be effectuated. Id. ¶ 3j. The ultimate determination whether to effectuate the DCO's proposed transfer is "made on a case-by-case basis, taking into account the particular circumstances of the transfer, the country, and the detainee concerned, as well as any assurances received from the country." Id. Circumstances have arisen in which DOD ultimately elected not to transfer detainees to their countries of origin, including because of torture concerns, despite having an initial DCO determination to transfer those detainees. Id. Until the diplomatic process is completed for a particular detainee, DOD's decision to transfer that detainee cannot be effectuated and can be rescinded by the appropriate DOD official if those diplomatic discussions do not yield the required assurances regarding the treatment of that detainee upon his return. Id. ¶ 31. Even after those assurances are received from the receiving government, the decision to return a detainee to that country can be rescinded or revisited if new information is received, with respect to the sufficiency of the assurances or otherwise, warranting further consideration. Id. That rescission authority exists until the detainee is actually transferred to the third country. Id.

Transfers of detainees are extremely sensitive matters that involve diplomatic relations with other countries, as well as the law enforcement and intelligence interests of other countries. Id. ¶ 31. The United States' ability to seek and obtain transfer assurances from foreign governments could be adversely affected by the public release of the DCO's transfer decisions prior to the completion of the diplomatic discussions. Id. Accordingly, DOD does not unilaterally release information about which detainees have been approved for transfer to any particular country, either publicly or to the detainees themselves. Id. ¶ 31-m. In fact, DOD has opposed disclosure of information regarding plans for transfers of detainees in the habeas cases filed by Guantanamo detainees in the District of Columbia, based on, among other things, the same concerns about interference with DOD's ability to transfer detainees and the United States' ability to conduct diplomatic relations. Id. ¶ 16c(2).[7]

[7] Four judges in that district have rejected the detainees' requests for advance notice that they are going to be transferred from Guantanamo. Id. ¶ 16c(2). Eight judges have granted such requests, and those decisions either have been or are in the process of being appealed. Id. Disclosure of the identifying information in this case could moot some of those appeals at least in part. Id. DOD has revealed its plans to transfer detainees only after all necessary diplomatic assurances were obtained and the ultimate decision to transfer was ready to be effectuated, and only as necessary to adhere to or comply with a court order. Id.

2. The Transferring Detainees' Identifying Information Is Protected from Disclosure Under Exemption 5 and the Deliberative Process Privilege

Exemption 5 protects information that "would not be available by law to a party . . . in litigation with the agency." 5 U.S.C. § 552(b)(5). This exemption, inter alia, incorporates traditional discovery privileges, including the deliberative process privilege. Wood, 432 F.3d at 83. It also protects "documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions are made." Id. (citing NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 150-51 (1975)) (internal quotation marks omitted).

An agency record must satisfy two criteria to qualify for the deliberative process privilege: it "must be both 'predecisional' and 'deliberative.'" Grand Central Partnership, 166 F.3d at 482 (citations omitted). A document will be considered predecisional if the agency can "pinpoint the specific agency decision to which the document correlates," and "verify that the document precedes, in temporal sequence, the decision to which it relates." Id. (quoting Providence Journal Co. v. United States Dep't of the Army, 981 F.2d 552, 557 (1st Cir. 1992)) (internal quotation marks omitted). "A document is 'deliberative' when it is actually . . . related to the process by which policies are formulated." Id. at 482 (citation and internal quotation marks omitted; alteration in original). In determining whether a document is deliberative, courts inquire as to whether it "formed an important, if not essential, link in [the agency's] consultative process," and whether it might "reflect inaccurately upon or prematurely disclose the views of [the agency]." Id. at 483.

The identifying information of the detainees who the DCO has determined should be transferred, but who have not yet been transferred because the necessary diplomatic arrangements have not yet been made, satisfy these criteria. First, the information is pre-decisional because the ultimate determination to transfer a detainee is not final until DOD and the Department of State obtain the requisite assurances from the receiving country. Hecker Decl. ¶¶ 3j-l, 16c. The DCO action memoranda that contain the identifying information, which conclude that particular detainees should be transferred, therefore precede the ultimate determination that the detainees will, in fact, be transferred from Guantanamo. Until DOD and the Department of State obtain the requisite assurances from the receiving countries and finalize the transfer arrangements, no final determination as to transfer has been made. See id.

The identifying information is also deliberative because it forms not only an important, but an essential link in DOD's consultative process of determining whether a detainee will be transferred. Indeed, it is the DCO action memoranda, in which the identifying information is contained, that trigger that process. See id. ¶ 3j. Disclosure of the identities of the detainees who have been identified as candidates for transfer, moreover, would prematurely disclose the views of the agency because, until the necessary arrangements have been made, DOD has not finally determined that transfer is appropriate. Id. ¶ 3j-l. Disclosure of this information to detainees also raises security concerns. See id. ¶ 3m. Thus, protection of the identifying information in this case would serve the privilege's key purpose of avoiding "premature disclosure of proposed policies before they have been finally formulated or adopted." Grand Central Partnership, 166 F.3d at 481; see also Fulbright & Jaworski v. Dep't of Treasury, 545 F. Supp. 615, 620 (D.D.C. 1982) (concluding that "much harm could accrue to the negotiations process" if deliberative notes of treaty negotiations were disclosed).

Furthermore, as discussed above, disclosure of such information could interfere with DOD's ability to transfer wartime detainees and the United States' ability to conduct diplomatic relations, Hecker Decl. ¶ 3l, and, accordingly, should not be "available by law to a party . . . in litigation with the agency." Cf. Crosby v. National Foreign Trade Council, 530 U.S. 363, 381 (2000) (expressing disapproval of acts that "compromise the very capacity of the President to speak for the nation with one voice in dealing with other governments"). For these reasons, the information is therefore protected by Exemption 5.

3. The Transferring Detainees' Identifying Information Is Also Protected from Disclosure Under Exemption 6

Finally, DOD has properly withheld under Exemption 6 the identifying information contained in the transfer documents for the additional reason that disclosure of that information could subject the detainees and their family members to harm. As set forth in DOD's submissions in AP v. DOD, 05 Civ. 3941 (JSR), which are incorporated by reference herein, and the Declaration of Karen L. Hecker ¶¶ 15a, 16d, DOD has serious concern that release of the detainees' identifying information could place the detainees and their family members and associates at substantial risk of harm from individuals who may be displeased with the testimony that the detainees have provided to the CSRTs or ARBs. Because this concern is exacerbated by the release of identifying information in the context of documents contemplating the detainees' release, id. ¶ 16d, DOD continues to withhold this information as to the narrow subset of ARB documents relating to detainees' release from Guantanamo.

CONCLUSION

For the foregoing reasons, the Court should grant DOD's motion for summary judgment.

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Respectfully submitted,

MICHAEL J. GARCIA
United States Attorney for the
Southern District of New York
Attorney for Defendant

By: s/ Sarah S. Normand
SARAH S. NORMAND (SN-2834)
Assistant United States Attorney
86 Chambers Street
New York, New York 10007
Telephone: (212) 637-2709
Facsimile: (212) 637-2702

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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ASSOCIATED PRESS, : **ECF CASE**

Plaintiff,

- v.-

05 Civ. 5468 (JSR)

UNITED STATES DEPARTMENT OF DEFENSE,

Defendant.

- -x

DEFENDANT'S (CORRECTED) MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

MICHAEL J. GARCIA
United States Attorney for the
Southern District of New York
Attorney for Defendant
86 Chambers Street
New York, New York 10007
Telephone: (212) 637-2709
Facsimile: (212) 637-2702

SARAH S. NORMAND
Assistant United States Attorney

- Of Counsel -